Neutral Citation Number: [2021] EWHC 121 (Ch)

Case No: PT-2020-MAN-000048

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT MANCHESTER
PROPERTY TRUSTS AND PROBATE LIST

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 27 January 2021

Before :

HIS HONOUR JUDGE CAWSON QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

(1) STEVEN JOHN WILLIAMS **(2) DAVID ROBERT ACLAND** **(In their Capacity as Joint Receivers appointed pursuant to a Legal Charge)**	**Claimants**
- and -	
(1) JOHN ADRIAN SIMM **(2) JAMES RICHARD SIMM** **(3) JEREMY MARK SIMM** **(As trustees of the Albert Tims Will Trust)**	**Defendant**

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Oliver Wooding (instructed by **Clarke Willmott LLP**) for the Claimants
The Defendants in person

Hearing date: 14 January 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to BAILII.

The date and time for hand-down is deemed to be 10.00 a.m. on Wednesday 27 January 2021

His Honour Judge Cawson QC:

Introduction

1. In these proceedings the Claimants, as joint fixed charge receivers appointed pursuant to the terms of a legal charge dated 11 October 2016 and made between the Defendants (1) and LSC Finance Ltd ("**LSC**") (2) ("**the Legal Charge**"), seek declaratory relief as to the validity of the Legal Charge and their appointment as fixed charge receivers, and other relief to enable them to carry out their functions as fixed charge receivers.

2. The proceedings were commenced by way of Part 8 Claim Form on 15 April 2020, but on 22 September 2020 District Judge Carter ordered that the claim be *"transferred to Part 7 and allocated to the Multi-Track"*, and gave directions for the filing and service of statements of case. These statements of case, comprising Particulars of Claim, a Defence and Counterclaim, a Reply and Defence to Counterclaim, and a Reply to Defence to Counterclaim were subsequently filed and served.

3. I had before me on 14 January 2021:

    3.1. An application by the Claimants dated 24 December 2020 ("**the SJ Application**") seeking an order pursuant to CPR 3.4(2)(a) striking out the Defence and Counterclaim, alternatively seeking summary judgment pursuant to CPR 24.2, and judgment in favour of the Claimants on the claim and counterclaim as set out in a draft order attached to the application; and

    3.2. An application by the Defendants dated 11 January 2020 ("**the Defendants' Application**") seeking an order that the SJ Application itself be struck out pursuant to CPR 3.4 and/or that summary judgment be granted pursuant to CPR 24.2, alternatively that the Claimants be required to produce a further witness statement: *"to comply with the relevant CPR Rules and in particular state the facts and law to properly sustain the summary application so that the Defendants can clearly understand the case they have to meet."*

4. The SJ Application was supported by the third witness statement of Ellen Yeates dated 24 December 2020 ("**Yeates 3**") and was initially listed to be heard before His Honour Judge Hodge QC on 4 January 2021, the date fixed for the hearing of a further Costs and Case Management Conference as directed by the Order of District Judge Carter dated 22 September 2020. However, notice was not provided to the parties as to the date of this hearing until 30 December 2021, and the parties sensibly agreed, amongst agreeing other directions, that the SJ Application should be relisted to be heard on 14 January 2021. On 4 January 2021, His Honour Judge Hodge QC made an order to this effect.

5. Thereafter, on 11 January 2021, the Defendants issued the Defendants' Application, which was also made returnable on 14 January 2021. The Defendants' Application is supported by the second witness statement of the First Defendant dated 11 January 2021 ("**JA Simm 2**"). This latter witness statement takes a number of procedural points in relation to the SJ Application, and also deals with various defences to the proceedings advanced by the Defendants as pleaded in their Defence and Counterclaim, and Reply to Defence to Counterclaim.

6. Given that the Defendants, by the Defendants' Application, took a number of procedural objections to the SJ Application, I considered it appropriate at the hearing on 14 January 2021 to first determine whether the SJ Application ought to proceed on its merits in the light of those procedural objections, or whether I ought to strike out, dismiss or adjourn it in the light of the procedural issues taken by the Defendants' Application as developed and expanded upon in the course of submissions.

7. For reasons set out in an oral judgment given on 14 January 2021 (as supplemented by further observations made shortly prior to the short adjournment on that day), I declined to strike out, dismiss or adjourn the SJ Application, and proceeded to hear the SJ Application on it substantive merits.

8. In this judgment, I propose to

    8.1. Summarise my reasons for not acceding to the request to strike out, dismiss or adjourn the SJ Application on the procedural grounds advanced;

    8.2. Set out the background to the proceedings;

    8.3. Set out the appropriate test to apply on an application to strike out, and for summary judgement;

    8.4. Identify the various defences raised by the Defendants and said by them to provide them with a real prospect of successfully defending the proceedings on their merits; and

    8.5. Set out my conclusions and decision as to whether the defences raised do provide the Defendants with a real prospect of successfully defending the proceedings on their merits.

9. The Claimants appeared by Oliver Wooding of Counsel. The Defendants appeared in person, with the Second Defendant conducting the advocacy on their behalf. As demonstrated by the contents of JA Simm 2 and the Skeleton Argument prepared by the Defendants for the hearing with their impressive citation of provisions of the CPR and case law, and by the quality of the advocacy of the Second Defendant, the Defendants have a sophisticated grasp of the issues involved in the present case. I am grateful to both Mr Wooding and the Second Defendant for the assistance that they provided to me in identifying and dealing with the issues that arise for consideration.

The Defendants' Application and the procedural objections taken by the Defendants

10. By the Defendants' Application and the evidence in support (JA Simm 2), and as expanded upon in the course of submissions, the Defendants took a number of procedural objections in respect of the SJ Application, namely that:

    10.1. The Claimants had failed to comply with CPR 24.4(3)(b) and 24 PD para 2(3)(a) because the Defendants had been given insufficient notice of the issues to be determined, and the Claimants had failed sufficiently to identify the points of law that they relied upon;

    10.2. The Claimants had failed to comply with 24 PD para 2(3)(b) in that neither the SJ Application nor the evidence in support of it stated that the SJ Application was made

because the Claimants believed that on the evidence the Defendants had no real prospect of successfully defending the claim or the relevant issues, and failed state that the Claimants knew of no other reason why the disposal of the claim or relevant issues should await trial;

10.3. The Claimants had failed to comply with 24 PD para 2(5) in that the SJ Application had not drawn the Defendant's attention to CPR 24.5(1) requiring the Defendants to file evidence 7 days prior to the hearing.

11. The Defendants further relied upon the fact that the Claimants' Skeleton Argument had been served late, and that the final electronic bundle for the hearing had only been provided late the previous evening.

12. As to the issues raised, I held that:

12.1. The SJ Application, and the evidence in support of it, had sufficiently identified the issues to be decided on the SJ Application, Yeates 3 having, in particular, identified the relevant issues by reference to the position taken by the Claimant in their Reply and Defence to Counterclaim, and JA Simms 2 having demonstrated the Defendants' understanding as to, and ability to deal with the relevant issues;

12.2. Whilst there had been a breach of 24 PD para 2(3)(a), this had been rectified by a fourth witness statement made by Ellen Yeates on 12 January 2021, cf. *Thomas Cook v Louis Hotels SA* [2013] EWHC 2139 (QB) at [38]. No prejudice had been demonstrated, and I considered that any defect could and should be waived.

12.3. So far as 24 PD para 2(5) was concerned, the SJ Application had been adjourned on 4 January 2021 without any objection being taken, the Claimants' Solicitors had advised the Defendants as the requirements of CPR 24.5(3) in an email sent on 9 January 2021, and the Defendants had filed and served JA Simm 2, which although formally made in support of the Defendants' Application, in practice set out the matters that the Defendants intended to rely upon in opposition to the SJ Application. Again, I could not see that any significant prejudice been occasioned, and I consider that any procedural defect could and should be waived.

12.4. As to late service of the Skeleton Argument and the electronic hearing bundle, I considered that the Defendants had suffered no discernible prejudice, and that this ought not provide a reason for not proceeding to hear the SJ Application, the Defendants being well on top of the relevant documentation and the issues that arose.

13. Further, I held that it was not open to the Defendants to apply pursuant to CPR 3.4(2)(a) to strike out the SJ Application, or to seek summary judgment in respect of it pursuant to CPR 24.2. The SJ Application and the evidence in support of it is not a *"statement of case"* within the meaning of CPR 3.4(2(a), and the SJ Application, as I see it, stands or falls on its merits, subject to any procedural objections that might have been be taken in relation to it. I did not understand the Defendants' Application to be seeking summary judgment in the Defendants' favour in respect of the claim and counterclaim, but in any event there is no basis for the Defendants to seek such relief on the merits.

14. I consider that my decision to proceed with the hearing was vindicated by the fact that it was able to proceed without the Defendants encountering any difficulty in being able to present their case in respect of the merits.

Background to the SJ Application

15. The Defendants are the trustees of the Albert Tims Will Trust ("**the Trust**"). In that capacity, they are the freehold owners and registered proprietors of the property known as Land lying to the South East of the A6070, Burton in Kendal, Cumbria registered at HM Land Registry with title number CU 142934 ("**the Property**").

16. The Defendants, on behalf of the Trust, have sought to develop the Property by the construction of residential homes. After a number of unsuccessful attempts, the Defendants obtained planning permission for residential development from South Lakeland District Council ("**SLDC**") on 29 December 2015, albeit subject to a number of planning conditions.

17. The development of the Property has been funded by monies advanced by LSC pursuant to the terms of:

    17.1. A Facility Agreement dated 11 October 2016 ("**the Facility Agreement**") that provided for a term loan with a commitment of £1,350,000; and

    17.2. A series of subsequent term loan agreements ("**the Loan Agreements**") dated 13 September 2017 (with a commitment of £1,877,000), 19 September 2018 (with a commitment of £470,500), 25 February 2019 (with a commitment of £418,500), and 2 July 2019 (with a commitment of £196,500).

18. The above advances were secured by the Legal Charge.

19. LSC was defined as entering into in each of the Facility Agreement, the Legal Charge and the Loan Agreements as *"the Lender"*.

20. The Facility Agreement and the Loan Agreements each defined the Defendants as *"the Borrower"*, and the Legal Charge defined the Defendants as *"the Chargor"*. In respect of each such deed, the Defendants were described as entering into the same *"as trustees for the time being of the Albert Tims Trust" … "on behalf of the Beneficiaries"*, the *"Beneficiaries"* being defined as the named individual beneficiaries of the Trust.

21. The Facility Agreement and the Loan Agreements dated 13 September 2017, 19 September 2018, 25 February 2019, and 2 July 2019 were preceded respectively by loan offer letters dated 8 April 2015, 28 April 2017, 6 September 2018, 19 February 2019, and 27 June 2019 ("**the Offer Letters**"), which were each signed by way of acceptance by the Defendants. In respect thereof, it is to be noted that:

    21.1. Each contained, at paragraph 7 thereof, the following:

    > *"[LSC] accept the borrowers are acting as Trustees of the "SIMM Family Trust" and have no personal liability for the loan"*.

    21.2. However, each provided at paragraph 8.5 that:

"Your property/assets may be repossessed in the event that you do not comply with all of the terms of the repayment of the loan."

21.3. Further, the last three of the five Offer Letters included, near the beginning thereof, the following wording:

"This will be a commercial loan facility and the main commercial terms are set out below in this Offer Letter. These terms will be incorporated into our Specific Terms and Conditions which together with our General Terms will form the Facility Agreement between you and us."

22. The Facility Agreement contained the following provisions of relevance for present purposes:

22.1. *"Event of Default"* was defined by clause 1.1 as meaning: *"any event or circumstance specified as such in Clause 18".*

22.2. *"Finance Document"* was defined by clause 1.1 as meaning: *"this Agreement, the Security Documents and any other document designated as such by the Lender and the Borrower"*, where the definition of *"Security Documents"* extended to include the Legal Charge.

22.3. *"Material Adverse Effect"* was defined by clause 1.1 as including: *"a material adverse effect of the Borrower to complete the Development"* and any other material adverse effect on the business, operations, property, condition (financial or otherwise) or prospects of *"an Obligor"*.

22.4. *"Maximum Term"* was defined by clause 1.1 as meaning: *"the date falling 24 calendar months after the date of this Agreement, subject to an extension accordance with clause 7.3";*

22.5. *"Obligor"* was defined by clause 1.1 as meaning: *"the Borrower and any other guarantor or surety of any obligation to the Lender under the Finance Documents"*;

22.6. *"Repayment Date"* was defined by clause 1.1 as meaning: *"the date upon which the Loan is irrevocably and unconditionally discharged in full which shall be no later than the Maximum Term and no earlier than the Minimum Term".*

22.7. By clause 10 it was provided that the Defendants should: *"repay the Loan, all accrued interest and any other liabilities in full no later than the Repayment Date (unless extended pursuant to clause 7.4 of this Agreement) together with the redemption fee due pursuant to Clause 7.2 …"*

22.8. By clause 12, the Defendants (as Borrower) represented and warranted to LSC that, on the date of the Facility Agreement:

22.8.1. *"… they are each validly appointed Trustees acting in accordance with their powers (and not exceeding such powers) under their constitutional documents and/or with the consent of the Beneficiaries"* (clause 12.1);

22.8.2. *"No limit on its (sic) powers will be exceeded as a result of the borrowing or grant of Security contemplated by the Finance Documents"* (clause 12.3);

22.8.3. *"Its (sic) obligations under the Finance Documents are legal, valid, binding and enforceable in accordance with their terms"* (clause 12.4).

22.9. By clause 15.4 it was provided that: *""the Borrower must comply in all respects with all planning law, permissions, agreements and conditions to which the Property may be subject including for the avoidance of doubt the Development Planning Permission"*.

22.10. By clause 17, it was provided amongst other things that:

22.10.1. *"The Borrower will procure that the Development is carried out in accordance with the Agreed Plans, Requisite Consents, Development Planning Permission, Development Budget and Construction Documents"* (clause 17.1.2);

22.10.2. *"The Borrower must not amend or vary the Development Planning Permission or apply for any such amendment or variation without the prior written consent of the Lender"* (clause 17.16);

22.10.3. *"The Borrower will, if required by the Lender, negotiate the terms of planning or other obligations with the local planning or other authority….but may not settle the terms of any such document without the approval of the Lender"* (clause 17.17).

22.11. The Events of Default provided for by clause 18 included:

22.11.1. Any Obligor failing to pay on the due date any sum payable by *"it"* under any Finance Document, unless failure to pay was caused solely by an administrative error or technical problems and payment was made within three Business Days of its due date (clause 18.1).

22.11.2. Any event occurring (or circumstances existing) which, in the opinion of LSC, did or was likely to have a *"Material Adverse Effect"* (clause 18.25).

22.12. By clause 26 it was provided that:

22.12.1. *"No amendments of any Finance Document shall be effective unless it is in writing and signed by, or on behalf of, each party to it (or its authorised representative)"* (clause 26.1);

22.12.2. *"The Lender hereby confirms that it has no right to call and no Trustee shall be obliged to grant, a personal guarantee in respect of the Loan under this Agreement"* (clause 26.5).

23. The Legal Charge contained the following provisions of relevance for present purposes:

23.1. *"Secured Obligations"* were defined by clause 1.1 as meaning: *"all present and future obligations and liabilities, whether actual or contingent and whether owed*

jointly or severally, as principal or surety and/or in any other capacity jointly or severally, as principal or surety and/or in any other capacity whatsoever, owed by the Chargor to the Lender together with all costs, charges and expenses incurred by the Lender in connection with the protection, preservation or enforcement of its rights against the Chargor";

23.2. Clause 1.2.1 provided that: *"Capitalised terms defined in the Facility Agreement have, unless expressly defined in this Deed, the same meaning in this Deed".*

23.3. By clause 2, the Defendants covenanted that: … *"it (sic) will pay and discharge the Secured Obligations to the Lender as and when the same fall due, but for the avoidance of doubt their liability shall be limited to the realisation proceeds of assets charged pursuant to this Deed."*

23.4. By clause 3, the Defendants with full title guarantee, amongst other things, charged the Property to LSC by way of legal mortgage as security for the payment and discharge of the Secured Obligations.

23.5. By clause 9.1, it was provided that the security created by the Legal Charge should become immediately enforceable if an *"Event of Default"* had occurred and was continuing.

23.6. By clause 11.1 it was provided that: *"At any time after the occurrence of an Event of Default, or if requested to do so by the Chargor, the Lender may (by deed or otherwise and acting through its authorised officer)… 11.1.1 appoint one or more persons jointly or severally to be a Receiver of the whole or any part of the Charged Property…"*.

23.7. Clause 12 set out the powers of a Receiver appointed pursuant to clause 11.1.1, which included:

23.7.1. A power for the Receiver to take possession of the Charged Property (clause 12.2.1)

23.7.2. A power to sell all or any part of the Charged Property in any manner and on such terms as he thinks fit (clause 12.2.4); and

23.7.3. A power to complete any building operations and/or apply for and maintain any planning permission, building regulation approval or other authorisation in each case as he thinks fit (clause 12.2.7).

24. The Proprietorship Register relating to the Property has, at all relevant times, contained a restriction in the following terms ("**the Restriction**"):

"Except under an order of the registrar no disposition by the proprietor of the land is to be registered without a certificate signed by the solicitor to the registered proprietors that the said disposition is in accordance with the terms of the trust of the will of Albert Tims, deceased".

25. Contemporaneously with the grant of the Legal Charge, Cartmell Shepherd, Solicitors, provided a certificate in the following terms ("**the Certificate**"):

> *"**Title Number: CU142934***
> ***Land Lying to the South East of the A6070 Burden in Kendal ("the Property")***
> *As Solicitors for John Adrian Simm, James Richard Simm, and Jeremy Mark Simm, being the Registered Proprietors of the Property, we confirm that the legal charge dated 11 October 2016 and made between (1) John Adrian Simm, James Richard Simm, and Jeremy Mark Simm and (2) LSC Finance Ltd is in accordance with the terms of the trust of the Will of Albert Tims, deceased."*

26. The production of the Certificate to HM Land Registry enabled the Legal Charge to be registered against the title to the Property on 1 November 2016.

27. The Loan Agreements, entered into after the Facility Agreement and the Legal Charge, provided for further facilities for the drawdown of funds for the development of the Property in the amounts referred to in paragraph 17.2 above. Each included and incorporated *"Specific Terms"*, and *"General Terms and Conditions (version 3)"*, and thereby incorporated similar terms to the Facility Agreement, and specifically provided for the liabilities of the Defendants thereunder to be secured by the Legal Charge.

28. It is to be noted that the Loan Agreements each included:

    28.1. Near the beginning thereof, the following wording:

    > *"You as Borrower agree that once this letter is signed by you as the Borrower it will constitute the Specific Terms (as such term is defined in Clause 1 (Definitions and interpretation) of the General Terms) and together with the General Terms will form the facility agreement (**Agreement**)";*

    28.2. A provision providing that: *"The liabilities and obligations of each Trustee under the Agreement shall be joint and several"* – see e.g. clause 1.6 of the Loan Agreement dated 13 September 2017;

    28.3. In the General Terms and Conditions, an anti-oral variation provision in like terms to clause 25.6 of the Facility Agreement.

    28.4. A declaration signed by the Defendants in the following terms: *"By signing the Agreement each person constituting the Borrower acknowledges and confirms that notwithstanding the commercial nature of the Agreement they will each be jointly and severally liable for all of the liabilities and obligations owed to the Lender under and pursuant to the Agreement and that by signing the Agreement their personal assets may be at risk in the event of non-payment and/or performance of such liabilities and obligations."*

29. Funds were drawn down pursuant to the Facility Agreement and the Loan Agreements in order to fund the development of the Property. LSC has produced redemption statements as at 30 September 2020 showing the total sum outstanding thereunder as being £6,314,453.34.

30. It is the Claimants' case that the Defendants had anticipated that the development of the Property would have been completed by summer 2019, whereupon individual dwellings could have been sold in order to repay LSC.

31. It was, as referred to above, an express term of the Facility Agreement that the Defendants would comply with any relevant planning permission, and it is the Claimants' case that the Defendants were in breach of the conditions provided for by the planning permission granted by SLDC. On or about 24 August 2019 the First Defendant applied to SLDC to request a discharge from certain of the conditions.

32. It is the Claimants' case that the Loan Agreement dated 19 September 2018 provided for the relevant loan to be repaid by 13 September 2019, and that upon this loan not being repaid, there was an *"Event of Default"* under that Loan Agreement, and in consequence under the Facility Agreement and the other Loan Agreements, entitling LSC to formally demand the repayment of all sums due and owing thereunder. Such a demand was made by LSC by letter dated 15 October 2019, but has not been satisfied.

33. It is the Claimants' case that, on 21 October 2019:

    33.1. A representative of LSC, the Claimants, and the First and Second Defendants met and discussed the situation, and the First and Second Defendants were informed that LSC intended to appoint the Claimants as Receivers under the Legal Charge;

    33.2. The Claimants were validly and effectively appointed in writing by LSC as Receivers under the Legal Charge, and validly and effectively accepted their appointment as such.

34. Contemporaneously therewith, discussions took place between LSC, the Claimants and the First and Second Defendants with regard to the steps that might be taken to finish the development of the Property. Consequential thereupon, LSC advanced some further limited funds, and the Defendants undertook further limited works.

35. Against this background, by an email dated 21 October 2019, Shaun Morley ("**Mr Morley**"), the Managing Director of LSC, wrote to the First Defendant in the following terms:

    "The min we would accept is £3m from yourselves we are currently at over £3.5m not including default interest and other associated costs.

    The £3m would be on the basis that the site continues to be finished with immediate effect and there are no delays, all monies to finish would be on the basis of previous working with jonathan (sic) and paid down when falling due.

    We have offered a solution, I will stress again we will not accept anything less.

    Kind Regards,

    Shaun Morley

    Managing Director

    LSC Finance Ltd"

36. At the bottom of this email appeared the following:

    "**Reservation of Rights: Notwithstanding any settlement, whether express or implied, made by [LSC] or any officer on their behalf under this email, [LSC] does not waive any rights title or interest to any provision under or pursuant to any written agreement between [LSC] with (sic) any other person (whether an individual or corporate body)."**

37. It is the Defendants' case that the email dated 21 October 2019 amounted to a contractual offer made against the background of a threat by the Defendants to seek injunctive relief to prevent LSC from enforcing its security, which such offer was accepted by the Defendants going back on site and continuing the building works, thereby resulting in a variation of the Facility Agreement and Loan Agreements whereunder LSC would provide further funds for the continuation of the building works, and accept the sum referred to in the email dated 21 October 2019 in settlement of the Defendants' liabilities. Alternatively, the Defendants maintain that these dealings gave rise to an estoppel. I return to these contentions in due course below.

38. In the event, on 28 October 2019, SLDC refused the First Defendant's application for the discharge of the relevant planning conditions. Further discussion between the parties failed to provide a solution satisfactory to LSC, and on 27 November 2019, LSC informed the Defendants that the Claimants, as receivers, would take control of the development of the Property.

39. Thereafter, the Claimants did take possession of the Property, and took steps to complete the development thereof. The Defendants disputed the right and entitlement of the Claimants to take this course of action.

40. In the light of this challenge, the Claimants commenced the present proceedings by Part 8 Claim Form on 15 April 2020 seeking:

    40.1. Declarations as to the validity of the Legal Charge and their appointment as receivers;

    40.2. An order for sale of the Property; and

    40.3. Costs and *"such other and/or ancillary orders to ensure registration of the Claimant's interest at the Land Registry, and as the court shall think fit."*

41. The Defendants, acting in person, filed a lengthy witness statement disputing the Claimants' entitlement to the relief that they sought.

42. On or about 19 June 2020, the Defendants, on the Claimants' case with others acting on their behalf, physically re-took possession of the Property from the Claimants, before the Claimants had been able to complete the development. In response thereto, the Claimants commenced proceedings in the County Court at Barrow-in-Furness, against the Defendants, and also against Rachel Simm, Lauren Simm and Lara Estates Ltd, claiming possession of the Property. On 16 October 2020, the Claimants were granted a limited form of interlocutory injunction by HHJ Dodd, sitting (remotely) in the County Court at Barrow in Furness. By his order dated 16 October 2020 HHJ Dodd ordered that these County Court proceedings be transferred forthwith to the Business and Property Courts in Manchester *"for further case management and to consider whether the claim should be consolidated with"* the present proceedings. The Order of His Honour Judge Hodge QC dated 4 January 2021 provides for the consolidation of the two sets of proceedings.

43. As I have mentioned, on 22 September 2020, District Judge Carter converted the present proceedings to a Part 7 Claim, and gave directions for service of statements of case, which were duly served as referred to in paragraph 2 above. As also referred to above, District

Judge Carter also gave directions for a further Costs and Case Management Conference, which was initially listed for 4 January 2021.

44. The SJ Application was issued by the Claimants on 24 December 2020, after the Defendants had, on 10 December 2020, served their Reply to Defence to Counterclaim, whereby pleadings were closed. However, the SJ Application was issued before the present proceedings were consolidated with the Barrow in Furness proceedings by the Order of His Honour Judge Hodge QC dated 4 January 2021. Consequently the SJ Application is only addressed to the Defendants to the present proceedings, and I did not understand the other defendants to the proceedings as commenced in the Barrow in Furness County Court to be before me, not having been served with the SJ Application.

The correct approach to applications to strike out and for summary judgment

Strike Out – CPR 3.4(2)(a)

45. As to the application to strike out the Defence and Counterclaim under CPR 3.4(2)(a), my attention is drawn to PD3A para 1.62(2), which provides that: *"A defence may full within rule 3.4(2)(a) where the facts it sets out, whilst coherent, would not even if true amount in law to a defence to the claim."*. The commentary in White Book 2020 at 3.4.2 observes that the Court should draw a distinction between a defence which is not valid as a matter of law, and a claim (or defence) in an area of *"developing jurisprudence"*.

46. The Claimants maintain that all of the defences relied upon by the Defendants are matters which are not valid in now well settled areas of law, and are therefore liable to be struck out. Thus the application to strike out does not seek to strike out particular paragraphs of the Defence and Counterclaim, but rather seeks to strike out the whole statement of case.

Summary Judgment – CPR 24.2

47. The relevant principles are not in dispute. Pursuant to CPR 24.2, the court may give summary judgment against a defendant in the whole of the claim or on a particular issue if it considers that the defendant has no real prospect of successfully defending the claim or issue and there are no other compelling reasons why the case or issue should be disposed of at a trial. Further, insofar as a defendant is to be treated as a claimant for the purposes of any counterclaim, the court may give summary judgment against the defendant on the counterclaim if the defendant has no real prospect of succeeding on the counterclaim or a particular issue raised thereby.

48. As the notes in the White Book 2020 make clear at 24.2.3, *"real prospect of success"* means a *"realistic"* as opposed to a *"fanciful"* prospect of success, in respect of a claim or defence that carries some degree of conviction. However, in considering the issue, the court must not conduct a *"mini trial"*.

49. The correct approach to an application for summary judgment - in that case on an application by a defendant - was helpfully explained by Lewison J (as he then was) in *EasyAir Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15]:

> "i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91;*

ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

The issues that arise for consideration

50. The Defendants raise four particular issues which they say provide them with a real prospect of successfully defending the claim, and pursuing their counterclaim, namely:

50.1. The personal liability issue - An argument as advanced in paragraphs 8 to 12, 14 to 18, and 22 to 26 of the Defence, and paragraphs 1 and 2 of the Counterclaim to the effect that LSC contracted with *"the Trust"* rather than the Defendants as trustees, and that as the Trust is not a separate legal entity, the Defendants cannot be personally liable, and therefore there can be no liability secured by the Legal Charge;

50.2. The beneficiary issue - An argument as advanced in paragraph 13 of the Defence and paragraph 3 of the Counterclaim, the essence of which, as expanded upon in JA Simm 2 and in submissions, is that the Legal Charge is not valid because:

50.2.1. There was a failure to obtain the specific written consent of the beneficiaries of the Trust;

50.2.2. LSC, by its Solicitors, was aware that the grant of the Legal Charge exceeded the power of the Defendants, and/or acted in bad faith and contrary to duties owed to the Defendants in proceeding; and/or

50.2.3. The Legal Charge should not have been registered against the Property because the Certificate did not satisfy the terms of the Restriction.

50.3. The variation/estoppel issue – An argument, as advanced in paragraphs 18 and 27 to 34 of the Defence, and paragraph 4 of the Counterclaim that LSC and the Defendants entered into a binding agreement in late October 2019 to vary the terms of the Facility Agreement, the Loan Agreements and the Legal Charge the effect of which was to disentitle LSC from enforcing its security and enable the Defendants to continue with the development of the Property, alternatively that LSC, by virtue of dealings at that time became estopped from enforcing its security and stopping the Defendants from proceeding with the development of the Property.

50.4. The actual occupation issue – An argument that, as at the date of the execution of the Legal Charge, Beneficiaries were in actual occupation of the Property such that LSC took the Legal Charge subject to the rights of the Beneficiaries, thereby now disentitling LSC from enforcing its security.

51. In addition, the Defendants argue that they are entitled to rely upon CPR 24.3(2), which provides that summary judgment is not available in the case of proceedings for possession of residential premises against a mortgagor or a tenant or a person holding over.

52. I consider each of these potential defences in turn. Subject thereto, the evidence does, in my judgment, establish that an *"Event of Default"* had occurred under the Legal Charge entitling LSC to validly appoint the Claimants as fixed charge receivers, and thereby entitling the Claimants as such fixed charge receivers to take steps falling within their powers as provided for by clause 12 of the Legal Charge referred to in paragraph 23.7 above.

The personal liability issue

53. The Defendants rely, in particular, upon the following provisions of the relevant documentation, namely:

53.1. Paragraph 7 of the Offer Letters referred to in paragraph 21 above which referred to LSC as accepting that the Defendants were *"acting as Trustees of the Simm Family Trust" and have no personal liability for the loan"*.

53.2. The fact that the Defendants were described as entering into each of the relevant documents *"on behalf of the Beneficiaries"*.

53.3. Clause 26.5 of the Facility Agreement that provided that LSC had no right to call upon a Trustee to grant a personal guarantee in respect of the Loan provided for by the Facility Agreement.

53.4. Clause 2 of the Legal Charge that provided *"for the avoidance of doubt"* that the Defendants' liability should be limited to the realisation proceeds of assets charge pursuant to the Legal Charge.

54. It is said that the true effect of the relevant documentation was to exclude the Defendants from any form of personal liability, and to purport (impermissibly) to impose the liability upon the Trust as an entity.

55. The Defendants place reliance upon *Investec Trust (Guernsey) Ltd & Ors v Glenalla Properties Ltd & Ors* [2019] AC 271, [2018] UKPC 7 at [59] as authority for the proposition that a trust is not a legal person, and has no legal identity and/or capacity to contract. At [59], Lord Hodge said this:

> *"59. For this reason, it is necessary to start by setting out some well-established principles of English trust law which are relevant to the present issue:*
>
> *(i) A trust is not a legal person. Its assets are vested in trustees, who are the only entities capable of assuming legal rights and liabilities in relation to the trust. In particular, they are not agents for the beneficiaries, since their duty is to act independently.*
>
> *(ii) English law does not look further than the legal person (natural or corporate) having the relevant rights and liabilities. As Purchas LJ observed in dealing with the legal personality of a temple under Indian law in Bumper Development Corpn Ltd v Comr of Police of the Metropolis [1991] 1 WLR 1362, 1371:*
>
> > *"The particular difficulty arises out of English law's restriction of legal personality to corporations or the like, that is to say the personified groups or series of individuals. This insistence on an essentially animate content in a legal person leads to a formidable conceptual difficulty in recognising as a party entitled to sue in our courts something which on one view is little more than a pile of stones."*
>
> *(iii) The legal personality of a trustee is unitary. Although a trustee has duties specific to his status as such, when it comes to the consequences English law does not distinguish between his personal and his fiduciary capacity. It follows that the trustee assumes those liabilities personally and without limit, thus engaging not only the trust assets but his personal estate. As Lord Penzance put it in Muir v City of Glasgow Bank (1879) 4 App Cas 337 , 368, where debts are incurred by a trustee for the benefit of the beneficiaries, the trustee*

> *"could not avoid liability on these debts by merely shewing that they arose out of matters in which he acted in the capacity of trustee or executor only, even though he should be able to shew, in addition, that the creditors of the concern knew all along the capacity in which he acted."*

(iv) This liability may be limited by contract, but the mere fact of contracting expressly as trustee is not enough to limit it. It merely makes explicit the knowledge of the trustee's capacity which Lord Penzance regarded as insufficient: see Lumsden v Buchanan (1865) 3 M (HL) 89 . There must be words negativing the personal liability which is an ordinary incident of trusteeship. In Gordon v Campbell (1842) 1 Bell App 428 and Muir v City of Glasgow Bank itself, it was held that the words "as trustee only" were enough.

(v) A trustee is entitled to procure debts properly incurred as trustee to be paid out of the trust estate or, if he pays it in the first instance from his own pocket, to be indemnified out of the trust estate: In re Blundell (1888) 40 Ch D 370 , 376. To secure his right of indemnity, the trustee has an equitable lien on the trust assets: Lewin on Trusts , 19th ed (2017), para 21-043. Because an equitable lien does not depend on possession, it normally survives after he has ceased to be a trustee: In re Johnson (1880) 15 Ch D 548 , 552.

(vi) A creditor has no direct access to the trust assets to enforce his debt. His action is against the trustee, who is the only person whose liability is engaged and the only one capable of being sued. A judgment against the trustee, even for a liability incurred for the benefit of the trust, cannot be enforced directly against trust assets, which the trustee does not beneficially own. The creditor's recourse against the trust assets is only by way of subrogation to the trustee's right of indemnity: In re Johnson (1880) 15 Ch D 548 .

(vii) Because the creditor's recourse to the assets is derived from the trustee's right of indemnity, it is vulnerable. It is exercisable only to the extent that that right exists. It may be defeated if there are insufficient trust assets to satisfy his debt, or if the trustee's right of indemnity is defeated, for example because the debt was unreasonably or improperly incurred and the indemnity does not extend to such debts, or because the trust deed excludes it on account of the trustee's wilful default or gross negligence. More generally a breach of trust by the trustee, even in relation to a matter unconnected with the incurring of the relevant liability, will, to the extent that it creates a liability to account on the part of the trustee, stand in the way of the enforcement of the indemnity. As has frequently been observed, this can be hard on the creditor, who will usually have no knowledge of the state of account between the trustee and the beneficiaries. But the creditor can in principle protect his position, for example by taking a fixed charge over the trust assets, or, as in the present case, by stipulating for a personal guarantee from the principal beneficiary."

56. In reliance on this authority, it is the Defendants' case that the effect of the relevant documentation was not to impose any liability upon them as trustees but to purport to impose it on the Trust as an entity, and that as the Trust is not a legal person with an ability to assume legal rights and liabilities, the relevant documentation was ineffective to create any liability on any party. Consequently, as there was no liability secured by the Legal Charge it could not be enforced because enforcement depended upon there being a liability being secured thereby as illustrated, so it is said, by s 101(1) of the Law of Property Act 1925 which provides that the mortgagee's power of sale, subject of course to any additional rights granted by the relevant security, arises when the mortgage money has become due.

57. On this basis, so the Defendants argue, as it was not open to LSC to seek to enforce the Legal Charge, it was not open to LSC to appoint the Claimants as fixed charge receivers, and so the Claimants are not entitled to the declaratory and other relief that they seek.

58. It is certainly right that certain of the documentation produced by LSC or its Solicitors does appear to demonstrate a confusion as to the true legal status of a trustee vis-à-vis the trust of which he or she is trustee, and the beneficiaries thereof, and as to the capacity by which and in which a trustee enters into a contract as trustee of a trust where the correct position is that the trust has no distinct legal personality, and the counterparty to the contract entered into with the trustee has no right of recourse as against the trust assets save to the extent of the trustee's entitlement to an indemnity out of the trust assets, at least unless the counterparty take security enforceable as against a trust asset. This confusion is evident in particular from paragraph 7 of the Offer Letters, clause 26.5 of the Facility Agreement, and the fact, that, at one stage it was envisaged that the Beneficiaries would, themselves, execute a charge.

59. However, the function of the Court is to construe the relevant provisions of the Facility Agreement, the Loan Agreement and the Legal Charge applying the well settled principles of construction, namely that deeds and other documents require to be construed objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the relevant deed or other document, would have understood the language thereof to mean, evidence, whether from prior negotiations or otherwise, about what the parties subjectively intended or understood the deed or other documents of mean being inadmissible and irrelevant to the task of the Court – see eg *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173, at [62]-[66] per Lord Hodge.

60. In my judgment the reasonable objective observer with knowledge of the relevant background would plainly have understood the language of the Facility Agreement and the Loan Agreements to provide for some party to assume liability pursuant thereto following the advance of funds to the Defendants to enable the development of the Property to proceed, and would have understood these deeds to be providing by their terms for the liability to fall upon the Defendants.

61. I do not consider that the terms of the Offer Letters referred to in paragraphs 21.1 and 21.3 above materially assist for the purposes of the relevant construction exercise in that:

    61.1. Paragraph 7 of the Offer Letters was, as I see it, inconsistent with paragraph 8.5 thereof, which, in warning the Defendants that their property/assets might be repossessed in the event that they did not comply with the terms of the repayment of the loan, recognised that the Defendants had obligations that they were required to comply with which might have personal consequences.

    61.2. In any event, even if the Offer Letters did have some contractual effect, they were superseded by the terms of the Facility Agreement, the Legal Charge and the Loan Agreements, as to which:

        61.2.1. As a matter of true construction thereof, the provisions of the Facility Agreement did provide for the Defendants to have personal liability – see paragraph 63 below;

61.2.2. Clause 2 of the Legal Charge clearly recognised the personal liability of the Defendants, albeit limited as provided for thereby; and

61.2.3. The Loan Agreements each contained the provisions referred to in paragraph 28.2 and 28.4 above which made it clear that the Defendants' liability was joint and several, and very much a personal liability which might be enforced against them.

61.3. The Loan Agreements are best regarded as part of the parties' prior negotiations than anything else, and thus inadmissible in any event for the purposes of construing the Facility Agreement, the Legal Charge and the Loan Agreements.

62. The fact that the Defendants were expressed to enter into the relevant deeds *"on behalf of the Beneficiaries"* does not, in my judgment, materially assist the Defendants given this is an essentially neutral way of describing matters bearing in mind that the Trust has no separate legal personality. Of more significance, in my view, is that the Defendants were described as entering into the relevant deeds *"as trustees for the time being"* of the Trust, pointing to them acting as trustees in a capacity intended to have legal effect. This is reinforced by the wording of the representation and warranty on the part of the Defendants at clause 12.1 of the Facility Agreement to the effect that they were each validly appointed Trustees acting in accordance with their powers under their constitution documents and/or with the consent of the Beneficiaries.

63. The reference to the Defendants not being required to act as guarantors as provided for by clause 26.5 of the Facility Agreement points more, as I see it, to a misunderstanding on the part of the draftsman than an intention, construing matters objectively, to exclude the Defendants from personal liability. The wording of clause 26.5 should be contrasted with the wording of the definition of *"Obligor"* in the Facility Agreement, namely: *"the Borrower and any other guarantor or surety of any obligation to the Lender under the Finance Documents"*. The reference to *"any other guarantor or surety"* may be a misnomer, but the definition necessarily presupposes that the Borrower (i.e. the Defendants) is liable under the terms of the Facility Agreement, as would be any guarantor or surety.

64. Further, clause 2 of the Legal Charge, which I consider to be an admissible aid to construction of not only the Legal Charge, but also the Facility Agreement and the Loan Agreements, points to an intention that the Defendants should be personally liable, but that that liability should be restricted to an amount representing the amount realised from the Property and any other security. If the proper construction of the relevant Deeds was that the Defendants were excluded from personal liability, and that the liability was intended to fall upon the Trust *"in rem"* as the Second Defendant put it, then the wording in clause 2 limiting liability would be otiose.

65. Although, perhaps, of limited or no assistance in construing the Facility Agreement and the Legal Charge, it is not without significance that the Loan Agreements each expressly provided for the Defendants to be jointly and severally liable, and contained the declaration referred to in paragraph 28.4 above, by which the Defendants expressly recognised their personal liability. It was, of course, default in relation to one of these Loan Agreements that gave rise to LSC seeking to enforce the Legal Charge in October 2019.

66. I consider this issue to be the type of short point of law or construction specifically envisaged by Lewison J in *EasyAir Telecom* (supra) at [15] to be suitable for determination in the context of an application for summary judgment. In view of the fact that I consider that, as a matter of true construction of the relevant deeds, the latter are plainly to be construed as subjecting the Defendants to personal liability, I do not consider that the Defendants' argument that there was no personal liability secured by the Legal Charge can succeed.

67. I would add that I do not consider this to be a case where it can properly be said that further exploration as to the background circumstances is required before being able to reach a firm conclusion as to the proper construction of the relevant documentation, particularly having regard to the fact that evidence as to the parties' subjective intentions and prior negotiations are inadmissible for this purpose.

68. In short, therefore, I do not consider there to be any real prospect of the Defendants succeeding in defending the claim, or pursuing their counterclaim, on this ground.

The beneficiary issue

69. The Defendants' argument on this issue is encapsulated in paragraphs 3.3(a) to (d) of JA Simm 2, where it is said:

"a) The Claimants via paragraphs 13.5 and 13.6 of the first witness statement of Ellen Yeates have claimed that the Defendants did not have the right to borrow monies under the terms of the Trust of the will of Albert Tims

b) Further the Claimants at paragraph 39 (b) (see below) of the Reply and Defence to Counterclaim suggests that this was a matter for the Defendants and Beneficiaries and as a third party they could simply rely upon the "certificate" dated 11th October 2016.
……

c) The Defendants refer to paragraph 7.6 of their reply to Defence to Counter Claim and point to the facts that:

i) The solicitors for LSC Finance Ltd were required to obtain a Certified Certificate to comply with paragraphs 1.2.1 and 1.2.2 and 1.2.3 of Schedule 1 of the Facility Agreement dated 11th October 2016 that there were no limitations on the Trustees to borrow–in advance of the contract - which they failed to do.

ii) The solicitors for LSC Finance ltd (having taken upon themselves to advise the Defendants directly) having reviewed the terms of the Trust of the Will of Albert Tims failed to advise the Defendants on the 29th September 2016 that the terms did not contain the power of the Trustees to borrow.

d) *In the circumstances, the Defendants aver that on the alleged facts (which will require full trial e.g. cross examination of witnesses) there was a clear contractual requirement and / or tortious duty owed by Gunner Cooke to the Defendants and Beneficiaries ((and to LSC Finance Ltd) to ensure that the Trustees had the power to borrow and develop – and ,therefore, LSC Finance Ltd could not simply rely upon the said " Certificate" dated 11th October 2016 in order to complete."*

70. In addition thereto, in the course of submissions I was taken to correspondence between Graham Hall of gunner*cooke*, Solicitors acting on the part of LSC, and the First Defendant

which was said to show that LSC was aware that the granting of the Legal Charge would amount to a breach of trust, that Graham Hall should have informed the Defendants that they had no power to charge the Property, and that in the circumstances, LSC and/or its Solicitors having acted in bad faith, the Certificate should not have been submitted to HM Land Registry.

71. In addition, it was said that in so far as any form of overreaching by the Defendants as trustees is relied upon, this could not be effective if LSC had acted otherwise than in good faith.

72. Developing the point made in paragraph 3.3(d) of JA Simm 2, it was further said on behalf of the Defendants that the circumstances leading up to and concerning the submission of the Certificate to HM Land Registry required an investigation that rendered the matter unsuitable for summary determination.

73. I have considered the documentation said to show that LSC was made aware that it was concerned with a will trust, and that the powers of the Trustees thereof did not extend to granting the security in question, and therefore that LSC, by its Solicitors, acted in bad faith in taking the Legal Charge and submitting it for registration, particular reliance being placed by the Defendants on an emails dated 2 and 3 October 2016 from Graham Hall of gunner*cooke* to the First Defendant. However, I have been unable to detect any evidence at all that LSC or its Solicitors did act in bad faith, or believing that the Defendants did not have the power as Trustees of the Trust to enter into the Legal Charge.

74. It may be right that LSC's Solicitors did at one point look to obtaining a charge from the Beneficiaries themselves. However, ultimately reliance was placed upon the Certificate. This was provided by Solicitors acting on behalf of the Defendants, and these Solicitors duly confirmed on behalf of the Defendants that the Legal Charge was in accordance with the terms of the Trust. LSC and its Solicitors were, in my judgment, plainly entitled to rely upon this certificate as given on the Defendants' behalf, and I do not consider that it can now open to the Defendants to seek to go behind it, particularly in the light of the representations and warranties in clause 12 of the Facility Agreement.

75. Further, I can detect no proper basis for maintaining any claim that the Solicitors for LSC had reviewed the terms of the Trust and come to the conclusion that the Defendants did not have the requisite power and/or having done so were in breach of any contractual or tortious duty to advise the Defendants and the Beneficiaries in relation thereto. The email between Graham Hall and the Second Defendant does state that *"I have checked the trust docs you sent and effectively it stems from a will rather than a formal trust deed"*. However, there is no evidence that the entry into the Legal Charge involved any breach of Trust, or that the Solicitors acting for LSC considered that it did. In any event, LSC and its Solicitors were, in my view, entitled to rely upon the Certificate as provided by Cartmell Shepherd acting as Solicitors for the Defendants in this respect, and certainly owed no duty or duties to the Defendants as the counterparties to the relevant transaction.

76. The correct analysis is, as I see it, as follows:

    76.1. Being two or more in number, the Defendants, as trustees of the Trust, were in a position to overreach the interests of the Beneficiaries by a disposition for value, subject to the Restriction, the effect of which was to prevent the registration of any disposition unless a certificate of the kind provided for by the Restriction could be

produced whereby Solicitors acting for the registered proprietors confirmed that the relevant disposition was in accordance with the terms of the Trust.

76.2. The granting of the Legal Charge constituted a disposition for value, and therefore an overreaching event, subject to registration, and thus subject to the provision of such a certificate.

76.3. Such a certificate was duly obtained, and the Legal Charge duly registered upon production of the same.

76.4. In the circumstances, the interests of the Beneficiaries were overreached by the Legal Charge.

77. This issue raises a short point of law that depends on essentially unchallengeable facts as to the circumstances behind the provision of the Certificate, which is, in my judgment, suitable for summary determination.

78. In the circumstances, I do not consider that the Defendants have any real prospect of successfully defending the claim or pursuing their counterclaim relying upon this particular line of argument.

The variation/estoppel issue

79. The Defendants' case in respect of this issue is most clearly set out in:

79.1. Paragraphs 18(a) to (c) of the Defence where it is alleged as follows:

> *"(a) In addition, by reason of an offer made in writing via e mail on the 21st October 2019 to the Defendants by Mr Shaun Morley [Managing Director and large majority shareholder of LSC Finance Ltd i.e. the de facto owner of LSC Finance Ltd] - LSC Finance Ltd agreed to vary the terms and conditions of the loans mentioned at paragraph 8 of the Claimants Statement of Claim to £3m in full and final settlement thereof and therefore the Defendants aver that LSC Finance Ltd are estopped by representation from resiling from the said agreement and as a consequence of breach contract.*
>
> *(b) The said offer by Shaun Morley made no conditions as to withdrawal of the Defendants full legal rights. The said offer was made following an onsite discussion between the parties on Monday 21st October 2019 in which the matters mentioned at paragraph 32 (a) and (b) of the Claimants Statement of Claim were discussed in addition to the Defendants view that LSC Finance Ltd had not taken security over the properties as defined in CU142934 registered at the Durham Land Registry by reason of a failure to execute a Beneficiary Legal Charge produced by their conveyancing Lawyers Gunner Cooke for the specific purpose of.*
>
> *(c) The very real possibility of an Injunction Application by the Defendants against LSC Finance Ltd and / or the Claimants at Motion Day in the Manchester High Court on Friday 25th October was discussed. The Defendants accepted the said £3m offer and the parties thereto both acted and relied upon and changed their position to their detriment upon the same accordingly and in*

particular did not proceed with the said injunction application in consideration thereof."

79.2. Paragraphs 4.2 to 4.6 of the Counterclaim where it is alleged that:

"4.2) In fact a full and final settlement agreement (The Agreement) was reached (as aforesaid inter alia at paragraph 18 of the Defence) as a result of a written offer to the Claimants to cap the loan at £3m on or about 21st October 2019 made by the said Mr. Shaun Morley (Managing Director and majority shareholder of LSC Finance Ltd).

4.3) The Claimants aver that The Agreement was accepted (upon an entirely without prejudice to full legal rights of the Claimants basis) and acted upon by all parties (Claimants, LSC Finance Ltd and the Defendants) and accordingly both LSC Finance Ltd and the Claimants are estopped by representation from resiling from the said Agreement and as a result of breach of contract.

4.4) The Claimants aver that LSC Finance Ltd having issued the Demand Letter of the 15th October 2019 could not continue to demand funds said to be owing under the said loan agreements and at the same time advance further substantial funds in the sum of £48,895.65 to the Claimants (and not the Defendants) to complete the development without legally invalidating the said Demand letter. Further evidence is detailed in the said First Witness Statement of John Adrian Simm in this regard.

4.5) In the premises the Claimants aver that the terms of the said previous loan agreements were replaced by a new loan agreement i.e. The Agreement (without prejudice as to the full legal rights of the Claimants) that LSC Finance Ltd would provide funds to complete the development (to be undertaken by the Claimants) and LSC Finance Ltd would accept £2.7m for the open market properties and approximately £300k for the low cost units in full and final settlement of the alleged debt.

4.6) The Claimant avers that upon the terms of The Agreement the Claimant recommenced work on site and was paid a further £48,895.65 directly by LSC Finance Ltd for the work carried out, inspected and approved by the appointed surveyor Mr Jonathan Brownlow as had previously been the usual process for the stage payments to be made."

80. In the course of submissions, I pressed the Second Defendant as to how it was suggested that the offer made by the email dated 21 October 2019 had been accepted. The Second Defendant's response was that the offer was accepted by the Defendants going back on site and continuing the development works with LSC advancing further monies for that purpose. Of course, the Defendants were only back on site for a comparatively short period of time thereafter as referred to in paragraph 38 above.

81. It is to be noted that on 22 October 2019, the First Defendant responded to Mr Morley's email dated 21 October 2019 in the following terms:

Thank you for your offer below of £3m in full and final settlement - which I will now take up with Castle and the Beneficiaries who will actually be borrowing the monies.

You will be aware that there are in fact three other properties - plots 24,26 and 27 for which we are currently raising funds with Landbay.

So that we have a total picture of what is required could you please ask Penny to supply Alison Kinder with redemption figures (copied to me) and also release her from any current undertakings - so that we can see if there is any headroom here to assist with the funding.

I think we would need to structure the deal so that there would be funds necessary to release the open market properties (£2.7m) and also funds to release the low cost (300k - or what ever we can obtain from a housing association).

In terms of finishing the site - I think we are agreed it makes sense to get the work done - since Castle will not lend until the works are complete.

On the basis of the above proposed settlement I would be prepared to continue only as you suggest using Jonathan as valuer and drawing down as necessary.

I will restart immediately upon your agreement and in fact ask Jonathan to re instate his scheduled visit this week - so that I can get the trades back on site asap.

However you will appreciate that we do need full unfettered access to all the properties - since we still need to obtain Building Control / LABC approval.

We do need to re-assess the funding required to complete the site - including the access road works and I am awaiting a quotation for the laying of the wearing coat for the whole site and access road - together with the road upgrade costings - which I will supply to Jonathan as soon as I am in receipt - for your approval.

I would hope the above will result in a fair settlement to both your family and the ours and I will work towards this as best I can."

82. Thus the decision to return to site must be viewed in the context of the above exchange of correspondence.

83. There are, as I see it, a number of difficulties with the case as advanced by the Defendants, including questions as to certainty of terms and consideration for the variation of the existing contractual terms. However, in support of the application for summary judgment, Mr Wooding, on behalf of the Claimants, limits his case in respect of this defence to one line of argument, namely that:

    83.1. The Claimants are entitled to rely upon the anti-oral variation clause in clause 26.1 of the Facility Agreement, and clause 26.1 of the General Terms and Conditions of the Loan Agreements providing that: *"No amendment of any Finance Documents shall be effective unless it is in writing and signed by, or on behalf of, each party to it (or its authorised representative)."*

    83.2. There is no such writing.

    83.3. The Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2018] UKSC 24, [2019] AC 119, has recently held that: *"The law should and did give effect to a contractual provision requiring specified formalities to be*

observed for a variation" - see at [10] per Lord Sumption (with whom Lady Hale P, Lord Wilson and Lord Lloyd- Jones agreed).

83.4. It is not open to the Defendants to rely upon any estoppel in the absence of words or conduct unequivocally representing that the variation was valid notwithstanding its informality, such words and conduct necessarily having to go beyond the relevant promise itself, reliance being placed upon what was said by Lord Sumption in *MWB Business Exchange v Rock* at [16].

84. The Defendants sought to place reliance upon the minority judgment of Lord Briggs in *MWB Business Exchange v Rock*. Although agreeing with the result, Lord Briggs considered that the parties can agree to remove an anti-oral variation clause from their bargain in a similar way to the parties removal of a *"subject to contract"* condition from their negotiations – see at [19], but that: *"what is conceptually impossible is for the parties to a contract to impose upon themselves such a scheme, but not be free, by unanimous further agreement, to vary or abandon by any method, whether writing, spoken words or conduct, permitted by the general law"* – see at [26]. However, he did hold that such an agreement must be express, or arise by strictly necessary implication, and that an implied agreement could not be found simply from the fact that the parties agree orally on a variation of the substance of their relationship without saying anything at all about the clause – see Cartwright, Formation and Variation of Contract, 2nd Edn at 5-41 referring to Lord Briggs at [24] and [31].

85. In my judgment the Claimants are correct in their analysis.

86. There was no agreement to vary in writing, whether signed by or on behalf of each party to it, or otherwise in that:

86.1. This is not a case where an agreement was concluded by an exchange of emails. As I see it, whilst LSC's email dated 21 October 2019 might have amounted to a contractual offer, the email in response from the First Defendant dated 22 October 2019 did not amount to an acceptance thereof, but rather indicated that further information was required before agreement could be reached, and raised the possibility of further potential contractual terms. This is no doubt why the Second Defendant identified the going onto site to recommence the development works as the acceptance of any contractual offer, rather than this email. However, until any offer, if indeed there was any effective contractual offer, was accepted by the Defendants going back onto site, there can, on the Defendants' own case have been no concluded agreement. Consequently, there can have been no agreement in writing satisfying clause 26.1.

86.2. In any event, any agreement in writing would have required to contain all the contractual terms. The exchange of email correspondence did not do so in that, for example, there is no mention therein of the threat by the Defendants to bring injunction proceedings, the promise of which not pursue formed, on the Defendants' pleaded case, part of the contractual bargain.

86.3. There is the further point that whilst the authorities suggests that an electronic signature on an email might satisfy the requirements of a statutory or contractual provision requiring signature, the authorities further show that an email signature will not be sufficient for this purpose unless it can properly be said to have

> *"authenticating intent"* - see *Neocleous v Rees* [2018] EWHC 2462 (Ch), and the authorities on this point referred to therein. In the present case LSC's rights had been reserved by the additional wording at the end of the email dated 21 October 2019 referred to in paragraph 36 above. Such wording does, as I see it, negative any suggestion that the electronic signature of Mr Morley in the email dated 21 October 2019 had authenticating intent.

87. The decision of the Supreme Court in *MWB Business Exchange v Rock* requires the Court to give effect to the terms of clause 26.1 of the Facility Agreement and the General Terms and Conditions of the Loan Agreements, with the effect that any agreement might have been concluded between LSC and the Defendants, to vary the Facility Agreement, the Loan Agreements and/or the Legal Charge that did not accord with the requirements of clause 26.1 will have no contractual effect, even if any such non-compliant agreement was reached. In view of the matters referred to in paragraph 86 above, the requirements of clause 26.1 were not satisfied in the case of any agreement that might have been concluded between LSC and the Defendants, and so it is not open to the Defendants to rely upon the same as having effectively varied the terms of the Facility Agreement and the Loan Agreements, or indeed the Legal Charge (which was included within the definition of *"Finance Document"*).

88. As to any promissory or other estoppel, in *MWV Business Exchange v Rock* Lord Sumption at [16] said this :

> *"This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal promise itself: see Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA [2003] UKHL 17, [3] 2 All ER 615, [2003] 2 AC 541 at [9] (Lord Bingham), [51] (Lord Walker)."*

89. I have considered whether it might be said that this is a developing area of law and that, in those circumstances, it can properly be said that there is a real prospect of a promissory or other estoppel argument succeeding and/or some other reason why the present case should go to trial. However, Lord Sumption has, in the passage referred to in paragraph 88 above, clearly identified certain minimum requirements as to the application of promissory or other estoppel in circumstances such as the present case by reference to earlier authority. On this basis, I consider that the relevant law can properly be considered as settled rather than developing.

90. Those minimum requirements are clearly not, in my judgment, satisfied in the circumstances of the present case. There is no suggestion of there having been any words or conduct unequivocally representing that any agreed variation was valid *notwithstanding* its informality, whether going beyond the promise of promises or otherwise. In any event, I am far from satisfied that even Lord Briggs' alternative minority analysis in *MWB Business Exchange v Rock* provides any further assistance to the Defendants on this point

bearing in mind his requirement that there be an express agreement, or an agreement arising by necessary implication to remove the anti-oral variation clause from the bargain, his observation that an agreement was not to be implied from the mere fact that the parties agree orally upon a variation without saying anything at all about the relevant provision, and the way that he, at [30] and [31], equated the circumstances in which an implied agreement and an estoppel might arise.

91. Further, I do not consider this to be a situation where it can seriously be suggested that further evidence might be available at trial that might lead to a different conclusion.

92. In the above circumstances, I do not consider that the Defendants have any real prospect of successfully defending the present proceedings, or of successfully pursuing their counterclaim, based on this line of defence.

Actual Occupation

93. The argument is, as understood, that as there were Beneficiaries in actual occupation of the Property at the time that the Legal Charge was granted, LSC took the Legal Charge subject to the interests of the Beneficiaries under the Trust, and that this now prevents LSC from enforcing the terms of the Legal Charge, and the Claimants from acting in their capacity as fixed charge receivers appointed pursuant to the Legal Charge.

94. The Defendants' case is set out in the Reply to Defence to Counterclaim where the same responds to paragraph 39(g) of the Reply to Defence and Counterclaim. Paragraphs (a) to (c) thereunder plead as follow:

> *"a) The property under CU142934 was in actual occupation by Beneficiaries as early as August 2015.*
>
> *b) All of the design work for the development was carried out "in house" by Rachel Simm BSc Architecture (Beneficiary) , the other Beneficiaries and the First Defendant. In addition Rachel Simm is a director and Lauren Simm Secretary of Lake District Developments Ltd, which submitted the planning documents to SLDC and undertook the development as main contractor thus maintaining a continuous presence on the Property from the start.*
>
> *c) In the premises the Defendants aver that the Beneficiaries were at all times in actual occupation of the land by the Beneficiaries in order to survey, sample testing (foundation and drainage) and provide plans and elevations which culminated in plans being submitted under SL/2015/0427 (available on the SLDC website) and the properties then being built."*

95. Having referred to *Link Lending v Bustard* [2010] EWCA Civ 424 at [23] and [27], the Reply to Defence to Counterclaim continues as follows:

> *"e) In particular Rachel Simm provided inter alia the site layout options and design for Plots 28 and 29 Church Bank Gardens, submitted plans to SLDC , and was involved in the build and now lives in plot 28 Church Bank Gardens along with James Simm (Plot 24) and Lauren Simm who owns plot 31 Church Bank Gardens where manifestly from the above there has been a continuing intention by the beneficiaries to occupy the Property right from the start through planning, development and residing in the houses."*

96. Having particular regard to the fact that the Property was, as at the date of the Legal Charge, an undeveloped site, I do not consider that, on any view, the fact that one or more of the Beneficiaries might have been involved in the then proposed development, being involved with design work or in submitting planning documents and matters of this nature, goes anywhere near establishing, even if true, that any Beneficiary was in actual occupation of the Property. Such involvement falls, in my view, well short of any form of occupation of the Property. Whilst it is suggested that certain Beneficiaries may now be in occupation of certain properties that have now been built upon the Property, that was not the position as at the date that the Legal Charge was executed.

97. In any event, even if any Beneficiary was in actual occupation, I see no reason why the entry into the Legal Charge by two or more trustees of the trusts of land relating to the Property would not have overreached the interests of the relevant Beneficiaries in any event, at least once the Certificate had been obtained, and registration of the Legal Charge effected thereafter.

98. Thus, again, I do not consider that this issue provides the Defendants with a defence providing any real prospect of success, or a counterclaim that has any real prospect of success.

CPR 24.3(2)

99. I consider it unlikely that CPR 24.3(2) applies to a claim for possession against the Defendants as mortgagors of a development site, albeit that residential units may have been constructed thereon.

100. However, I am concerned that the position is somewhat more complicated than this. As explained in paragraph 42 above, the possession proceedings in the County Court at Barrow in Furness were commenced against the Defendants and three other defendants. The Part 8 Claim Form and the Particulars of Claim do not in terms include a claim for possession. Further, the Barrow in Furness proceedings were only consolidated with the present proceedings by His Honour Judge Hodge QC's Order dated 4 January 2021, after the SJ Application was issued. Consequently, the other defendants to the Barrow in Furness proceedings in which the possession order was sought are not parties to SJ Application, have not been served therewith and are not before the Court.

101. The draft order attached to the SJ Application includes the headings of both sets of proceedings, and provides for a possession order against the Defendants and the three additional defendants to the Barrow in Furness proceedings. However, in the light of the above, I do not consider that it would be appropriate for me, as matters stand, to grant summary judgment in respect of the Claimants' claim for possession of the Property, notwithstanding that the Claimants' powers as fixed charge receivers include the power to take possession of the Property. It would, as I see it, be necessary for the additional defendants to be party to this or some other application for summary judgment before this Court could properly consider making a possession order on a summary basis.

Conclusion

102. It follows from my consideration of each of the respective lines of defence raised by the Defendants that I do not consider that the Defendants have any real prospect of successfully defending certain at least if the Claimant's claims, and that the defences raised are, on the

basis of unchallenged or unchallengeable facts, bad at law with the consequence that the Claimants are entitled to summary judgment for the following heads of relief, namely:

102.1. A declaration that the Legal Charge was validly granted and registered at HM Land Registry as security for the liabilities of the Defendants under the Facility Agreement and the Loan Agreement, and is binding upon the Defendants;

102.2. A declaration that the Claimants were validly appointed as fixed charge receivers of the Property pursuant to the Legal Charge on 21 October 2019;

102.3. An order that the Property be sold;

102.4. An order that a unilateral notice dated 17 January 2020 registered by the Defendants against the Property at entries 10 and 11 of the Charges Register be vacated.

103. For the reasons set out in paragraph 101 above, I do not consider it appropriate to make a possession order in relation to the Property at present given that the SJ Application was issued prior to consolidation, and given that the three additional Defendants joined to those proceedings are not before the Court. The further pursuit of this aspect of the claim is, as I see it and subject to further argument to the contrary, at a subsequent hearing.

104. Further, I do not consider it appropriate to grant a money judgment in the Claimants' favour in particular for the full amount alleged to be outstanding of £6,314,453.34 plus continuing interest, enforcement and receivership costs. Irrespective of the fact that the relevant liability is to LSC rather than the Claimants as such, as Mr Wooding recognised in the course of submissions, the personal liability of the Defendants is limited by the terms of clause 2 of the Legal Charge to the proceeds of sale of the Property, and on this basis could not be finally quantified until the Property has been sold in enforcement of the Legal Charge. However, monetary judgment ought to be unnecessary, because if a sale of the Property can be achieved, then LSC can recover its full entitlement out of the proceeds of sale of the Property.

105. Whilst the draft order attached to the SJ Application makes provision for the Claimants' claim for damages and interest to be stayed with liberty to restore, neither the Claim Form nor the Particulars of Claim in the present proceedings contain any claim for damages, albeit including a claim for sums outstanding under the Loan Agreements, and so I do not consider that it is open to me to make any such order in respect of damages and interest as the SJ Application was issued prior to consolidation. It may be, and I have not seen the Claim Form in the proceedings commenced in the County Court at Barrow in Furness, that damages are claimed in those proceedings. If so, any claim for damages would, as see it, have to await an application for summary judgment in the consolidated proceedings even if the Defendants had no real prospect of defending the claim for damages. The same considerations apply, in my view, to the injunctive relief provided for in the draft order, which is also sought as against the other defendants.

106. I have considered the relief claimed by the Defendants in their Counterclaim. In view of my findings above in relation to the issues that arise for consideration, I do not consider that the Defendants have any real prospect of success in respect of any of the various heads of relief set out in the Counterclaim. In those circumstances, I consider that the Claimants are entitled to summary judgment on the Counterclaim.

107. Given my findings, I consider that the present SJ Application is best more appropriately dealt with by granting summary judgment, rather than by ordering that any specific part or parts of the Defence and Counterclaim be struck out.

108. I would hope that the parties can agree a form of order consequential upon this Judgment, but if not I will hear submissions at an appropriate time thereupon.